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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 879.

SHIP-BY-TRUCK CO., INC., d/b/a GRAHAM SHIP-BY-TRUCK COMPANY,

AND

GRAVES TRUCK LINE, INC.,
Appellants,

VS.

UNITED STATES OF AMERICA

AND

INTERSTATE COMMERCE COMMISSION,

AND

STEVENS EXPRESS, INC., S & C TRANSPORT COMPANY, INC., and SPENCER BROTHERS, INC.,
Appellees.

JOINT BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM.

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Ship-By-Truck Co., Inc., d/b/a Graham Ship-By-Truck Company and Graves Truck Line, Inc., present this brief in opposition to motions of United States of America

and the Interstate Commerce Commission, and Stevens Express, Inc., S & C Transport Company, Inc., and Spencer Brothers, Inc., received April 15, 1963, which seek to affirm the judgment of the specially constituted three-Judge United States District Court for the District of Kansas, entered October 5, 1962, from which this direct appeal is taken.

The statement as to jurisdiction filed herein sets forth the basis of this Court's jurisdiction to entertain this direct appeal, the statement of the case, and a statement of the questions presented and their substantiality. In addition, it contains the opinion of the District Court and the final orders of Division 3 of the Commission, as appendices A, B and C thereto, respectively.

Appellants assert that the questions presented by this appeal are substantial and merit plenary consideration by this Court upon full brief and argument, after which the judgment of the District Court should be reversed and the cause remanded to the Interstate Commerce Commission for proceedings under Section 5 of the Interstate Commerce Act [49 U.S.C., Section 5].

SUMMARY OF ARGUMENT.

The issue before the Court involves two basic questions which are necessarily interrelated. The first question is whether a transaction whereby a non-carrier is seeking to purchase the operating rights of two carriers must be handled under Section 5, the answer to which must necessarily involve consideration of Section 5(10) of the Interstate Commerce Act, which exempts transactions from Section 5 where (a) all the parties to the transaction are motor carriers, and (b) assuming the first test applies,

whether the parties in the aggregate operate in excess of 20 vehicles subject to part II of the Act.

The second question presented is, assuming the Commission may determine that such a transaction is entitled to exemption from Section 5 by virtue of Section 5(10), have the applicants presented such substantial, probative and competent evidence to allow the Commission to make a finding of its jurisdiction to determine whether the transaction is subject to Section 5.

ARGUMENT.

The issue before the Court here involves the construction of the Interstate Commerce Act in respect to the applicability of Section 5, *vis-a-vis* Section 212(b), and a determination as to where the Commission's jurisdiction lies in a transaction where a non-carrier is attempting to purchase the operating rights of two motor carriers.

As stated by the applicants before the Commission in their motion to affirm, Section 5(2) is principally concerned with the bringing of two or more carriers under control or management in a common interest, citing *County of Marin* v. *United States*, 356 U.S. 412, 416 (1958); *St. Joseph Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298.

The issue presented to this Court by appellants involves a determination of where jurisdiction lies and the Court must necessarily determine the substantiality of that question in deciding whether to note probable jurisdiction. Appellees have entirely missed the point in arguing that the substantiality of the transaction itself is the question which controls. Their contention is misplaced.

Both motions argue that the routes involved are so inconsequential that only four vehicles are required to provide the necessary service. Appellants operate the routes and serve the points involved, collectively operating hundreds of vehicles in that service. The ultimate adverse effect on appellants is of great concern to them, and their revenue subject to diversion runs into Hundreds of Thousands of dollars.

If jurisdiction turned on the size of the transaction, (here involving the $90,000 purchase price, operating capital and equipment investment), then perhaps the commission did not err; however, this is not the case. Section 5(2) of the Act specifically takes jurisdiction of a situation where a non-carrier seeks to acquire two or more carriers, and Section 5(10) of the Act exempts the transaction from Section 5(2) only where all the parties are motor carriers.

What logic is there in the appellee's argument and the lower court's finding that the two vendors knew nothing of the sale of the other's rights to vendee? The result was known to vendee, and the benefits of the "common interest" would accrue only to vendee. Certainly common scienter on the part of the vendors cannot be controlling. To divulge such information might have cost the vendee a valuable business transaction. What benefit would there be to vendee to divulge such information? None.

Appellees argue that the Commission certainly had the competitive consequences in mind, citing *U. S. v. Pierce*, 327 U.S. 515, 532. There is no evidence before the Commission upon which to base such a finding. In fact, there is no way under Section 212(b) to present comprehensive evidence of such a nature. The only way such evidence can be adduced is through hearing, with opportunity allowed for cross-examination of applicant's witness, and op-

position evidence adduced by protestants. The skeletal nature of the evidence before the Commission in this matter cannot even be blessed with the term "scintilla".

We respectfully urge that the question is not the size of the transaction where a non-carrier attempts to acquire two carriers, but whether jurisdiction under Section 5(2) can be abrogated at all.

CONCLUSION.

Appellants contend that even if the Commission had "discretion" to determine whether the instant transaction came under the jurisdictional requirements of Section 5 or Section 212(b), that there was not suffieient evidence submitted by the applicants to afford the Commission evidence of a substantial or competent nature to make such a decision. Reference to the underlying record in this case will make this immediately clear.

In any event, the appellees in their motions to dismiss have not discussed the substantiality of the issue before this Court.

The issues in this case are of first impression for this Court and for the Federal Courts generally. Mergers, consolidations and other transactions of like nature are constantly being sought by the motor carrier industry in its attempt to expand. Means of accomplishing such transactions with the least risk of failure are constantly being researched by not only the industry but the industry's legal counsel, who are generally specialists in the field. Where carriers are given the right to avoid proceeding under Section 5 of the Act the possibilities are endless and, in effect, the Commission has opened Pandora's Box.

Because of the substantiality of all the issues raised by this appeal, we respectfully pray that the Motions to Affirm be denied and ask that probable jurisdiction be noted.

Respectfully submitted,

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